United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7579

B

P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 76-7579

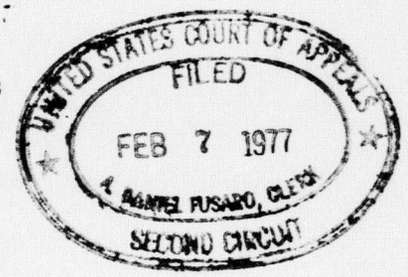
FIREBIRD SOCIETY, etc.,

Plaintiffs-Appellants

v.

MEMBERS OF THE BOARD OF FIRE COMMISSIONERS, etc.,

Defendants-Appellees



ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

APPELLANTS' BRIEF

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ERRATA

The following corrections should be made in Appellants' Brief:

Page	
i	Sixth line from bottom, for "COURTS" substitute "COURT'S."
ii	Line eight, for "PLAINTIFFS" substitute "PLAINTIFFS'."
iii	Case number 10, second line, for "4" substitute "¶."
iii	Case number 6, third line, for "Commissioners" substitute "Commission."
v	Case number 31, second line, after "Education," insert "66."
vi	Line 10, for "Paragraph" substitute "§."
2.	Lines three and ten, delete question marks.
4.	Line eighteen, after "of" insert "the."
4.	Bottom line, after "App. 77-90," insert "and."
12.	Seventh line from bottom, for "an of" substitute "of an."
17.	Third line from bottom, after "pp." insert "34-37."
17.	Bottom line, after "pp." insert "24-26."
23.	Line eleven, after "calculate" insert "its."
25.	Second line from bottom, for "note" substitute "noted."

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Pages

Pages

STATUTES AND LEGISLATIVE HISTORY

STATUTES INVOLVED

42 U.S.C. §2000e-5(k)

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

The Civil Rights Attorney's Fees Awards Act of 1976

> Be it enacted by the Senate, and House of Representatives of the Unites States of America in Congress assembled, That this Act may be cited as "The Civil Rights Attorney's Fees Awards Act of 1976".
>
> Sec. 2 That the Revised Statutes section 722 (42 U.S.C. 1988) is amended by adding the following: "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs".
>
> Approved October 19, 1976

Preliminary Statement

Plaintiffs appeal from an order of the United States District Court for the District of Connecticut (Honorable Robert C. Zampano, United States District Judge) fixing an award of attorneys' fees to them at $14,230.00, plus costs. The opinion of the Court on the issue of attorneys' fees is unreported. It is reproduced in the Appendix, pp. 196-201

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the fee award in this case was adequate to encourage enforcement of the civil rights acts?

2. Whether the Court's findings adequately support its award under the guidelines of City of Detroit v. Grinnell Corporation.

3. Whether the settlement of this case without trial, or the circumstances of the settlement, justify a reduced fee award?

4. Whether the Court erred when it denied plaintiffs fees for their successful work in opposition to intervention.

STATEMENT OF FACTS

History of the Lawsuit

This action, an attack on racial discrimination in the hiring and promotion practices of the New Haven Department of Fire Services, was brought by black members of the Department and unsuccessful applicants as a class action under both Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1983. App.9 It sought broad relief from employment practices that had resulted in the City of New Haven, whose population is approximately 30 percent minority, having a fire department that was only three percent minority with only one minority supervisor. App.13-14

Suit was filed October 5, 1973. Ten months later, on August 30, 1974, the District Court entered a consent order granting plaintiffs sweeping relief, including the hiring of 75 minority privates, immediate promotion of seven of the eighteen minority members of the Department, sharp reduction of time-in-grade requirements and replacement of discriminatory entrance and promotional examinations. App.58-66

The events leading to the consent order of August 30, 1974, have been summarized by the District Court itself. App.69-73 They included intensive negotiations

between the parties, at least 23 chambers conferences with the court, and resolution of numerous preliminary issues. Before entry of the final order plaintiffs secured interim orders restraining all hiring and promotion and a preliminary order instituting a hiring plan. App.51-57

Immediately after entry of the District Court's final order, white firefighters and an organization they had formed attempted to intervene to set aside the order on the ground that it discriminated against them. Plaintiffs successfully resisted intervention in the District Court, this Court, and the Supreme Court. After acquiescing in the District Court's decree, the defendants joined the plaintiffs in opposing intervention.

Defendants at all times opposed any award of attorneys' fees to plaintiffs. This issue was specifically reserved in the District Court's final order, and plaintiffs, after successful resolution of intervention issue, moved for an award of fees.

The Attorneys' Fee Application

In support of their request for a fee award, plaintiffs requested an evidentiary hearing in accordance with City of Detroit v. Grinnell Corp. 495 F.2d 448 (2d Cir. 1974). Prior to the hearing counsel submitted affidavits detailing their experience, background, and billing rates, App.77-90, further affidavits listing the time

spent on the case chronologically by date, amount of time, and nature of work performed. App.91-100 Defendants did not question these affidavits and declined to cross-examine plaintiffs' counsel, who were available. App.159

The affidavits showed that Attorney Koskoff is a senior partner with ten years' experience in a 12-lawyer litigation firm in Bridgeport, Connecticut. App.77-85 He is an expert in federal and state trial work with a substantial practice in major personal injury cases and experience in employment litigation which includes service as lead counsel in Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission, et al, 482 F2d 1333 (1973). App.80-81 His ordinary hourly billing rate in cases in which he is paid as his time accrues and not on a contingency basis is $75.00 per hour, although he has been paid at rates up to $125.00 per hour for consultation in Title VII cases. App.180

Attorney Rosen is a partner with seven years' experience in a 2-lawyer (now 3-lawyer) litigating firm and has an extensive federal court practice, including one argument on the merits in the United States Supreme Court. App.86 Like Attorney Koskoff, he has lectured to law students and lawyers as an expert in the field of employment discrimination. App.87 His ordinary hourly billing rate, in federal court cases in which his fee is not contingent on success, is $65.00 per hour. App.88

Plaintiffs were able to show the monetary value of their injunctive relief through the affidavit of Professor Heidi Hartmann of the New School, who calculated the financial impact of the court order on the minority firefighters who would benefit from it and on the community as a whole. This affidavit, the accuracy of which was not contested by defendants, App.159, analyzed the cost of racial discrimination in terms of the difference in average earnings between whites and minorities with the same qualifications. It then calculated the expected net financial benefit from increased income to qualified minority applicants who were hired or promoted by the defendants as a result of the court order. (Appropriate account was taken of the minority hiring that might have occurred had this action not been brought, and future earnings were discounted to their present value at a rate of six percent per year. App.112) Because even qualified black and hispanic workers earn so much less than the wages paid by the New Haven Fire Department, the net present value of plaintiffs' settlement in increased wages to minority firefighters was shown to be nearly four million dollars. App.112

Plaintiffs also introduced live testimony. Earl Geyer, one of the plaintiffs, verified some of the effects this action had already had on the New Haven community: jobs had been provided to previously unemployed men with families; the prestige of the Fire

Department had risen in the ghetto communities; and he had seen the growth of aspirations of black youngsters toward public service jobs that had previously seemed unattainable. App.161-171 Morale within the Department, moreover, was high, and one of the new minority firefighters hired pursuant to the settlement already has received the Department's second highest commendation. App.163-164

Barry Goldstein, the senior Title VII specialist for the NAACP Legal Defense and Education Fund, Inc., who works "almost exclusively" on employment discrimination problems, including litigation and assessment of Title VII enforcement, analyzed counsel's work in this case. He found that excellent results had been obtained, particularly with respect to promotional relief, and that these results had been achieved "amazingly expeditiously." App.136 He found the pleadings he examined to be of high quality, and after analyzing counsel's time sheets he found that quite moderate amounts of time had been spent on each task and that the total time claimed - 650 hours - was very modest considering the results obtained and the history of the litigation. App.138 Goldstein also testified concerning the difficulty of inducing the private bar to prosecute Title VII cases. He testified that while attempting to find counsel for Title VII

plaintiffs and cooperating counsel for Legal Defense Fund clients he has found that most qualified private practitioners are deterred from handling Title VII litigation by the complexity of the litigation, the time involved, and the perceived lack of adequate fee potential in light of the various contingencies on which recovery of a fee depends. App.128-135 As a result, he testified, major Title VII litigation is largely handled for plaintiffs by funded organizations such as his own, with the balance of enforcement coming, in very limited measure, from the federal government and from private practitioners primarily motivated by charity or public spirit. App.135

Jacob D. Zeldes, an experienced Connecticut lawyer with a substantial federal trial and appellate practice, corroborated Goldstein's testimony about the consequences of fee awards for Title VII enforcement. Zeldes testified that he had never handled an employment discrimination case and that the prospect of a fee of even $75.00 per hour would discourage firms such as his from undertaking employment discrimination cases, if receipt of the fee was contingent on winning the case. App.152 In order to attract a law firm such as his in the absence of an assured hourly fee, Zeldes testified, employment discrimination cases would have to promise a fee at a "higher than normal hourly rate, or some type of

contingency, or some combination of both". App.153 Neither his firm nor other firms would be likely to take employment discrimination cases "on a straight hourly rate with the risks involved". App.154

Defendants challenged none of plaintiffs' factual allegations but asserted that plaintiffs should bear their own fees, App.193, because the case was against a municipality, App.190 (although the evidence showed New Haven's annual budget is eighty-five million dollars per year, App.174)and the defendants ultimately agreed to a negotiated settlement. If fees were awarded, defendants urged that they be minimal in view of the public service nature of the case. App.176

The District Court found for plaintiffs on the question of entitlement, holding that although the case was settled it represented a "notable success" for plaintiffs, who were clearly "prevailing parties" within the meaning of 42 U.S.C. §2000e-5(k). However, the court denied fees for the time spent on intervention, on the ground that defendants too had opposed intervention and therefore should also be deemed "prevailing parties" as to this phase of the case. The Court reasoned, therefore, that to award plaintiffs fees aganst them would be "fundamentally unjust". App.200

The court then assessed fees at three different rates - $50.00, $35.00, and $25.00 per hour - although it did not specify the time to which these rates applied. It did not find any duplication of effort or unreasonable expenditure of time but it nevertheless awarded fees for only some of the time spent on the aspects of the case for which it had held a fee award to be just. The fee award of $14,230.00 plus $1,493.60 out-of-pocket costs amounted to an hourly rate of $36.00 for the time it allowed, $31.00 for all time claimed on matters other than intervention, and just over $21.00 per hour for all time expended by counsel representing their clients.*

This timely appeal from the attorneys' fee award followed.

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*Counsel claimed no award, and the court made none, for approximately 175 hours spent by law student interns on the case.

ARGUMENT

I. THE FEE AWARD IN THIS CASE WAS INADEQUATE IN LIGHT OF THE PURPOSE OF AN AWARD IN CIVIL RIGHTS CASES

A. The Statutory Purpose of a Fee Award to Encourage Enforcement of Civil Rights Laws Requires That Awards Be Adequate to Attract Competent, Experienced Counsel.

Congress has provided for "reasonable" attorneys' fee awards to successful plaintiffs in civil rights cases, eg, 42 U.S.C. § 2000e-5(k); Pub. L. 94-559 (1976), in order to stimulate enforcement of the civil rights acts. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); Northcross v. Memphis Board of Education, 412 U.S. 427 (1973); Torres v. Sachs, 538 F. 2d 10 2d Cir. 1976). In Torres this Court explicated the function of fee awards:

> Attorneys' fees are not awarded necessarily to punish for bad faith, but to recompense those who by helping to protect basic rights are thought to have served the public interest. A principal purpose of the legislation is to encourage people to seek judicial redress of unlawful discrimination. 538 F. 2d at 13.

It is established by now that the goal of encouraging litigation to vindicate civil rights so powerfully controls the discretion of courts applying the fee award provisions that awards should be made to prevailing parties except in "very unusual circumstances." Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975); Newman v. Piggie Park Enterprises, supra,; Northcross v. Memphis Board of Education, supra. That purpose likewise controls the discretion of the court with respect to the amount of fee that is "reasonable;" as the Torres court found, "the imposition of full attorneys'

fees is a useful and needed tool of the court to fully protect" plaintiffs' civil rights. 538 F. 2d at 13-14. Torres defines a "full" fee award, consistent with the function of an award to encourage civil rights litigation by "private attorneys general," Piggie Park Enterprises, supra, 390 U.S. at 402, as "the going rates for similar services received by privately employed counsel for work of comparable importance, extent and complexity." 538 F. 2d at 11. This formula offers an incentive under the civil rights acts to counsel to undertake representation of plaintiffs with meritorious claims, by providing that such representation will not require a financial sacrifice. It thereby offers the surest hope for full enforcement of the law. The Court's reference to the extent and complexity of litigation as a factor in setting fees is particularly significant in Title VII cases because, as plaintiffs' expert testified, they often require investments of time, money and effort that are so substantial that a commercial fee rate is a vital inducement to counsel contemplating shouldering the burden of an across-the-board attack on the employment practices of a company or government agency.

The importance of the purpose of a fee award to its size is illustrated by this Court's most recent opinion in this area. Equal Employment Opp'ty Comm'n v. Enterprise Association Steamfitters, 542 F. 2d 579 (2d Cir. 1976) sanctioned awarding a fee reduced below commercial rates

where plaintiffs were represented by a federally funded law firm. Such a reduction is not inconsistent with the central legislative purpose of encouraging law enforcement, because funded organizations typically do not require fees as an incentive to represent civil rights plaintiffs; on the contrary, such representation is their raison d'etre. Reduced fee awards to such organizations, therefore, do not deter representation, although they may somewhat diminish the amount of cases brought by reducing resources available for litigation. Private law firms like the ones that represent plaintiffs here, on the other hand, are, as any other member of the private sector, deterred from undertaking ventures, in this case complex lawsuits, by the expectation that they will lose money on them. The importance of legal representation pro bono publico does not remove, though it may sometimes outweigh, the deterrent effect of diminished fees for a private law firm. It was precisely Congress's intention in enacting civil rights fee award provisions to stimulate enforcement of the civil rights laws by freeing plaintiffs from reliance on the necessarily limited willingness of private counsel to make financial sacrifices in the public interest.*

*The reference in Steamfitters to the schedules for compensation under the Criminal Justice Act., 18 U.S.C. § 3006A, also illustrates the relevance of the purpose of a fee award provision to the amount of award that is appropriate. Payments under the CJA, like payments to funded organizations, do not operate to stimulate litigation but rather to help defray the costs of a public service. App. 178. They serve this purpose, although in varying degrees, whatever their size. Attorneys' fees under the civil rights acts, by contrast, fully serve

Congress's intention that "reasonable" fee awards should be "full" awards as Torres v. Sachs, supra, defined them, in order to stimulate law enforcement, has been made unmistakably clear with passage of the Civil Rights Attorneys' Fees Awards Act of 1976, Pub. L. No. 94-559 (1976). The Act, intended to overrule by legislation the Supreme Court's decision in Alyeska Pipeline Service C. v. Wilderness Society, 421 U.S. 240 (1975), has a full legislative history illuminating Congress's intention that fees awarded fully compensate and encourage counsel who represent civil rights plaintiffs. The Senate Judiciary Committee's report on the Act states:

> It is intended that the amount of fees awarded under §2278 be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases, and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see Johnson v. Georgia Highway Express, 488 F. 2d 714 (5th Cir. 1974), are correctly applied in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. para. 9444 (C.D. Cal. 1974); and Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter."

* cont'd
their intended purpose only when they are large enough to be an incentive to counsel contemplating an uncertain investment of time, effort, and money and a risk of receiving no fee if the case is lost. Cf. Palmer v. Rogers, 10 E.P.D. par.10, 499 (D.D.C. 1975) (also observing that fees under the CJA are not contingent upon success).

S. Rep. No. 94-1011 (94th Cong., 2d Session) at 6; see also

H. Rep. No. 94-1558 (94th Cong., 2d Session) at 8-9. **

** The standards Congress expressed in this Act govern the award in this case, although the Act was passed just two weeks prior to the District Court's opinion on the attorneys' fee application. The Act was intended to apply to all cases pending at the time of its enactment, in accord with the rule of Bradley v. Richmond School Board, 416 U.S. 696 (1974). See H. Rep., supra, at 4; 122 Cong. Rec. No. 149, at p. S17052 (Remarks of Senator Kennedy); Cong. Rec. No. 151, pt. II, at pp. H12155 (Remarks of Rep. Anderson), H12160 (Remarks of Rep. Drinan) H12166 (Remarks of Rep. Ashbrook). It has indeed already been held fully retroactive. Wade v. Mississippi Cooperative Extension Service, 45 L.W. 2301 (N.D. Miss. 1976.

Since this case was brought pursuant to 42 U.S.C. §§ 1981 and 1983 as well as Title VII, App. 9, relief granted by the consent order was not restricted in any way to exclude relief under §§ 1981 and 1983 and, at least under the law prevailing at the time the decree was entered, plaintiffs were equally entitled to relief under §§ 1981 and 1983 as under Title VII, Bridgeport Guardians v. Civil Service Commissioners, 482 F. 2d 1333, at 1340 (2d Cir. 1973); but see Washington v. Davis, 44 L.W. 4789 (6/7/76), the Civil Rights Attorneys' Fees Award Act governs this case and standards which it establishes for computing a reasonable attorneys' fee must be applied.

Even if the Act were not directly applicable to this case, its standards should be applied because its legislative history illuminates the congressional intention behind the fee award provision of Title VII. Plainly Congress did not intend that fee awards under Title VII should be any less than under the Civil Rights Attorneys' Fees Award Act. The purpose of the Act was, in fact, precisely "to achieve consistency in our Civil Rights laws," S. Rep. No. 1011, with respect to Attorneys' fees. Title VII was a model for the Act, and Congress specifically approved the rulings of those courts which have held that a "reasonable" attorneys' fee is a "full" attorneys' fee under existing legislation. S. Rep. No. 1011, supra, at 6.

Significantly, all of the cases cited in the Senate as having correctly applied the appropriate standards, made full fee awards; Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal 1974) - $63.00 per hour; Davis v. County of Los Angeles, 8 E.P.D. Para. 9444 - average of $65.00 per hour; Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975) - $65.00 per hour. Likewise, the reference to standards in anti-trust litigation as appropriate in cases governed by the Act reinforces the legislative expression of an intention to stimulate enforcement of the civil rights acts through financial incentives, and to place civil rights litigation on a financial par with litigation vindicating economic rights. Congress clearly meant to do no less than make civil rights cases attractive to all attorneys with the ability and resources to undertake them, by providing that prevailing plaintiffs would receive fee awards fully comparable to fees received in commercial litigation.***

*** The Civil Rights Attorneys' Fees Award Act was not brought to the attention of the District Court between the date of its passage and the date of the District Court's opinion two weeks later. This Court may, therefore, deem a remand appropriate to give the District Court an opportunity to consider the implications of the Act on this case.

B. The Fee Award In This Case Is Inadequate

The District Court awarded fees in this case at an average rate of $36.00 per hour for the time it allowed, $31.00 per hour for the time spent by counsel excluding time on opposition to intervention, which was wholly disallowed by the court,* and $21.00 per hour for all time spent by counsel.** Viewed in the context of the civil rights fee provisions and their purpose, these fees are plainly inadequate. They are far below the "full" attorneys' fee that is essential to a reasonable fee award, and they will deter rather than encourage civil rights enforcement.

The rates are first of all far below counsel's ordinary rates and for that reason alone operate to make civil rights enforcement a luxury for counsel, contrary to the purpose of the fee provisions. Rosen's fee rate is $65.00 per hour and Koskoff's is $75.00 per hour or more, up to a maximum of $125.00. These rates are for non-contingent work for which payment is received as the work is done. Obviously work at half these rates or less, for which no payment at all will be received unless plaintiffs prevail, and which requires a substantial outlay of time and money and a delay

* The court's exclusion of time spent on intervention is specifically addressed at pp. , infra.

** The court's failure to award fees for all non-intervention time spent by counsel is addressed at pp. infra.

in receiving payment is extraordinarily unattractive. It can continue only as essentially charitable work, subject to the time restrictions counsel must impose on their charitable and civic endeavors in order to make a living, rather than as an integral part of a trial lawyer's docket.

The testimony of Jacob Zeldes underscores the impact this fee award will have if left undisturbed. His office would not be encouraged to undertake Title VII cases by the prospect of a fee of even $75.00 per hour because of the delay of payment and its contingency. App. 152, 153,154. He testified that these factors would affect the willingness of most other law firms as well to undertake Title VII enforcement. With fee awards at the level set by the District Court for a successful class action attack on the employment policies of a substantial-size municipal agency, few private counsel would be willing to undertake a substantial Title VII case, and surely none would be encouraged to do so by the prospect of the fee award that awaited them if they were successful.

Finally, the fees awarded here are far below the rates approved in Torres v. Sachs, supra ($75.00 per hour for lead counsel), or the cases whose fee rates the Congress specifically approved in passing the Civil Rights Attorneys' Fees Award Act of 1976. See p. 14 , supra.***

***Other civil rights cases have also resulted in substantial fee awards. See, eg, Kelsey v. Weinberger, C.A. No. 1660 - 73 (D.D.C., 1976) $150.00 per hour); Smith v. Kleindienst,

If there is to be any encouragement to members of the bar to accept and prosecute employment discrimination cases, it is vitally important that court awarded fees be based on commercial fee levels. With the substantial investment of

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*** cont'd - 8 FEB Cases 752 (D.D.C. 1974), aff'd mem. ___ F. 2d___ (D.C. Cir. Dec. 2, 1975) (lead counsel $75.00 per hour); Rosenfeld v. Southern Pacific Co., 519 F 2d 529 (9th Cir. 1975) ($74.00 per hour); and O'Bannon v. Merrill Lynch Pierce Fenner & Smith, C.A. No. 73-905 (W.D. Pa). (average of $197.00 per hour).

Attorneys' fee awards in areas other than civil rights cases have been substantially higher. See, e.g., Arenson v. Bd. of Trade of City of Chicago, 372 F. Supp 1349, 1359 (N.D. Ill. 1974) ($386.56 per hour); In Re Gypsum Cases, 386 F. Supp. 954 (N.D. Calif. 1974) (lead counsel $300.00 per hour); Oppenlander v. Standard Oil Co., 64 F.R.D. 597, 613 (N.D. Cal. 1974) ($190.00 per hour); Doughboy Industries v. American Cyanamid Co., 1975 - 2 Trade Cases, Par. 60,452 (D. Minn. 1975) (lead counsel $300.00 per hour); Wynn Oil Co. v. Purolator Chemical Corp., 1975 - 2 Trade Cases, Par. 60,493 (M.D. Fla. 1974) (counsels' normal billing rates of $50.00 per hour for attorneys with less than five years experience and $75.00 per hour for more experienced attorneys were increased by a multiple of $50% producing hourly rates of $75.00 and $112.50 respectively; Ellis v. Flying Tiger Corp., 504 F. 2d 1004, 1008 (7th Cir. 1972) ($121.00 per hour); Levin v. Mississippi River Corp., 377 F. Supp. 926 (S.D.N.Y. 1974) $158.00 per hour); City of Detroit v. Grinnell Corp., 1976 - 1 Trade Cases Par. 60,913 (S.D.N.Y. April 21, 1976 (as amended April 26, 1976) (average of $244.00 per hour).

Finally, it should be noted that as early as 1970 district courts recognized that a normal hourly billing rate of $75.00 for experienced law firms was common. See, e.g., Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478, 484 (S.D.N.Y. 1970) rev'd on other grounds 405 U.S. 915 (1972).

attorney time required in employment discrimination cases, the long delay before there is any possibility of compensation and the fact that compensation and reimbursement are contingent on ultimate victory, employment discrimination litigation is inherently unattractive to potential counsel. Without the incentive of at least reasonable attorneys' fees, even so-called public interest attorneys will be forced to turn their attention to areas of litigation where the courts are less hostile to fee awards and the financial rewards are greater.

II. THE DECISION OF THE DISTRICT COURT IS NOT SUPPORTED BY THE FINDINGS REQUIRED BY THIS COURT'S DECISION IN CITY OF DETROIT V. GRINNELL CORPORATION OR BY THE RECORD

In City of Detroit v. Grinnell Corporation, 495 F 2d 448 (2d Cir. 1974), this Court established standards for setting and evaluating fee awards. The District Court's award of an inadequate fee stems in large measure from its failure to follow those standards; with respect to each of the crucial factors to consider in setting a fee award, it did not undertake the analysis required by Grinnell and as a consequence, did not take account of considerations documented in the record that mandated a much higher award.

The District Court's discussion of the basis of its calculation of the fee award is entirely conclusory with no analysis of the record before it. In its entirety (omitting the discussion of time spent on intervention) it reads as follows:

> In evaluating the fee requests, the factors placed on the scale by the Court include: (1) time and labor spent; (2) counsel's experience and reputation; (3) the magnitude and complexity of the litigation; (4) the amount recovered; (5) the attorneys' "risk of litigation"; and (6) awards in similar cases. See e.g. City of Detroit v. Grinnell Corporation, 495 F.2d 488, 468-474 (2 Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885, 890 n.7 (9 Cir. 1974); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5 Cir. 1974); Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974). . . .

> Applying these general standards to the present application, the Court notes, at the outset, that the core issues in the litigation were decided without lengthy and complex litigation. In the early stages of the lawsuit, several of the crucial concerns of the plaintiffs were resolved due to notable concessions by the defendants. Therefore, the Court must weigh in the balance the fair recovery for legal services, in the strict sense, and administrative, procedural and clerical work performed by counsel. Moreover, the Court has carefully inspected and considered counsel's time sheets, all the moving papers, the defendants' objections including those relating to the duplication of effort between the two attorneys, and the necessary exclusions of time attributed to the post-settlement proceedings. Finally, in its determination, the Court distinguishes between time spent in court and time attributed to research and related services.
>
> Accordingly, the Court awards Attorney Rosen $9,370.00 for 58 hours of services at $50.00 per hour, 132 hours at $35.00 per hour, and 74 hours at $25.00 per hour. Attorney Koskoff is granted $4,860.00 computed at 54 hours of services at $50.00 per hour, 26 hours at $35.00 per hour, and 50 hours at $25.00 per hour. In addition, the sum of $1,493.60 is awarded for counsel's out-of-pocket expenses. App.199-201

This type of "mere listing of factors" in setting a fee award was held inadequate by this Court in Grinnell Corp., supra, 495 F.2d at 470. In this case it has operated to permit a reduction of the fee awarded below any amount

either justified by the record or adequate to fulfill the purposes of an award under the civil rights acts.

A. The Court Failed to Make Adequate Findings With Respect to Reasonable and Usual Hourly Rates and Awarded Rates That Were Inadequate

Grinnell requires the trial court to fix a reasonable hourly rate for each attorney's time and then to adjust that rate as required by other relevant factors. The District Court wholly failed to make the requisite initial findings as to reasonable hourly rates. What it did was to calculate award on the basis of hourly rates, but to give no indication of how it arrived at those rates or, specifically, what rates it used as "lodestars," Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (3d Cir. 1973); that is, the basic rate representing reasonable compensation, before adjusting for factors such as quality of work and contingency of result.

The record provides no way of ascertaining the basis of the District Court's selection of $50.00, $35.00, and $25.00 as hourly rates it would apply to the work performed. The evidence of reasonable hourly rates is contained in the affidavits of counsel, which testify to hourly rates in non-contingent cases of $65.00, $75.00, and sometime more. As this Court said in Grinnell, "The value of an attorney's time generally is reflected in

his normal billing rate." 495 F.2d at 473, quoting Lindy Brothers, supra. 487 F.2d at 167 Not only did the District Court make no finding that these billing rates were excessive, it specifically found that counsel were "experienced, qualified members of the trial bar[,] . . . skilled, seasoned advocates who enjoy the highest reputation in the legal community." App.199 Yet it ignored these billing rates and made no finding of reasonable billing rates. The rates awarded by the District Court, in fact, were simply those it had applied in the previous application before it, a case in which fees were not awarded pursuant to statute and no comparable findings were made as to the qualifications of counsel. Jordan v. Fusari, No. 15,671 (D. Conn. 1975)

B. The Court Failed to Make Adequate Findings with Respect to Time Expended and Improperly Excluded Time Claimed

The District Court listed the number of hours for which it awarded compensation, but, except for its discussion of time spent opposing intervention, it gave no explanation of what time it had excluded or why. The time involved is substantial: of the 463.3 hours claimed by counsel apart from intervention time, the court excluded 69.3, or 15 percent. Yet defendants had accepted counsel's affidavits without cross-examination, App.159, and inspection of the time records fails to disclose the basis for the court's exclusion of time. Equally mysterious is why

65.5 hours of Attorney Koskoff's time were excluded and only 3.8 of Attorney Rosen's.

The record does not support the exclusion of time. Plaintiffs' expert testified without contradiction that the time spent was very moderate for work of the quality disclosed by the documents in the file, the results obtained, and the history of the lawsuit. App.136-139 Simple inspection of the time sheets shows that there was very little if any room to reduce the time spent, since the great bulk of it, between filing of the complaint and settlement of the case, was spent on chambers conferences and preparations directly relevant to those conferences.*

In the face of these facts, the complete failure of the court to indicate what time it was excluding, and why, cannot be dismissed as merely a failure to elaborate the obvious; the time spent by counsel was reasonable, and if the court were properly to award fees on the basis that some of it was not, it was obligated to make findings to support its award. City of Detroit v. Grinnell Corporation, supra, 495 F.2d at 493; Lindy Bros. Builders, Inc. v.

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*Representation of plaintiffs by two attorneys did not create any duplication of effort. In a class action lawsuit more than one attorney is frequently a necessity; in Grinnell itself, for example, at least 17 lawyers claimed fees. The presence of both lawyers at chambers conferences was necessary for effective negotation, as plaintiffs' expert testified and the District Court apparently agreed, since it appears to have allowed both counsel their time in chambers conferences. The risk of duplication was reduced, moreover, by the fact that both attorneys were involved in the case as the court note, "from the outset." App.199

American Radiator & Standard Sanitary Corporation, 540 F.2d 102, 109, 118 (1976); Merola v. Atlantic Richfield Co., 515 F.2d 165 (3d Cir. 1975).

C. The Court Failed to Make Adequate Findings With Respect to the Quality of Work Done and Result Obtained

Under Grinnell, the value of the result acheived has lost its place as the dominant factor in determining the size of a fee award*, but remains, along with the quality of the work performed, an important consideration. The District Court in this case entirely ignored these considerations despite its listing of "amount recovered" amongst the factors to be considered in setting an award. App.199

The court did note the substantial result obtained in the context of its discussion of the entitlement of plaintiffs to any fee at all. It described plaintiffs' victory variously as "extensive relief in the areas of recruitment, hiring, and promotion of minorities in the Department", "significant results", and a 'hotable success". App.198 Yet it made no mention whatever of what if any weight this success played in its fee award, and indeed awarded fees at identical rates to the fees it awarded

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*For this reason, plaintiffs do not claim the District Court erred in declining to award them the full fee they requested, $250,000.00, which is approximately the amount of a fee at their normal hourly rates plus a bonus of five percent of four million dollars, the value of the settlement. App.197

in Jordan v. Fusari, supra, in which it found that the issue of liability was virtually conceded by the defendant and the amount recovered fell far short of that anticipated when suit commenced.

Plaintiffs carefully documented the quality of the result obtained. Their economist had identified and quantified the major financial benefits of the settlement and had shown them to be worth approximately four million dollars. App.112 This figure, moreover, represents just a fraction of the true value of the settlement in terms of the increased pride, hope, and stability within the minority community that this money and the jobs obtained will produce. App.107 In addition, plaintiffs' employment discrimination expert compared the results obtained favorably with other class action settlements throughout the country and found the promotional remedy and the speed with which relief was obtained especially remarkable. App.139

The court erred when it failed to accord these important elements of the fee equation any independent consideration whatever.

D. The Court Failed to Make Adequate Findings With Respect to the Plaintiffs' "Risk of Litigation"

Counsel's risk in undertaking a case in which no fee may be recovered is, Grinnell holds, "perhaps the foremost" factor that should contribute to increasing

a fee award over the "lodestar" value. 495 F. 2d at 471 The District Court, however, listed this factor, with the others as a consideration and then wholly failed either to apply it or explicate its failure to do so. As a result, a fee smaller than ordinary rates of compensation was awarded, while the contingency factor justified a fee that was larger than ordinary rates.

Counsel in this case faced not one but two contingencies: first that they would not prevail in the lawsuit, and second that they would not prevail in their application for a fee award. As to the first contingency, with respect to hiring relief plaintiffs faced the formidable difficulty that the Department kept wholly inadequate records concerning people who failed the entrance test, thereby complicating enormously the problem of statistical proof. With respect to promotions, the difficulties were even more formidable because so few minorities had ever taken promotional examinations that no reliable statistical pattern could be established. See Bridgeport Guardians v. Board of Civil Service Commissioners, supra, 482 F.2d at 1333 In addition, suit was instituted before Albermarle Paper Company v. Moody, supra, established standards for evaluating the job-relatedness of examinations.

As to the second contingency, defendants have opposed an award of attorneys' fees throughout and have prevailed until this point on the issue of time spent on

intervention. A reasonable fee for time which is compensated must take these contingencies into account in order to effectuate the policies of the civil rights acts and provide a reasonable fee in comparison with other similar federal litigation. The court's failure to do so, or even to explain why it declined to do so, was error.

The standards enunciated in Grinnell originated in a case in which the fee was excessive, and they are premised on the need for objectivity in fee awards. This need is equally present when, as here, the award is inadequate. Morever, in this case the policy of the civil rights attorneys' fees provisions is applicable as well: this case shows that careful elaboration of the basis for a fee award is necessary to assure that fees are indeed adequate to encourage enforcement of the fundamental national goals expressed in the civil rights acts. The District Court's failure to follow the standards of Grinnell, like its failure to award an adequate fee, was error.

III. NEITHER THE FACT THAT THIS CASE WAS SETTLED WITHOUT TRIAL NOR THE MANNER IN WHICH IT WAS SETTLED JUSTIFIES A REDUCED FEE AWARD

The only reason suggested by the district court for reducing the fee award below a reasonable commercial rate was that

> The core issues in the litigation were decided without lengthy and complex litigation. In the early stages of the lawsuit, several of the crucial concerns of the plaintiffs were resolved due to notable concessions by the defendants. Therefore the Court must weigh in the balance the fair recovery for legal services, in the strict sense, and administrative, procedural and clerical work performed by counsel. App.200

These remarks are puzzling because they are at such odds with the history of this lawsuit as it was carefully detailed by the trial judge himself in his opinion on the application to intervene. Analysis of counsel's time records in relation to the court's description of the path of this lawsuit shows clearly that virtually all the time expended was on necessary efforts to win relief for their clients, not on mere administrative or clerical mopping-up.

First, 140.4 hours were claimed through the filing of the complaint October 5, 1973. All this time was obviously prior to any concessions by the defendants, and, as the court noted, plaintiffs were prepared, at the time of the filing of their complaint, to make a forceful showing of the appropriateness of immediate injunctive

relief. App.70 Thereafter, as the district court narrates, intensive negotiations took place. Notable concessions were indeed made by defendants, but the negotiation process was hardly undemanding on plaintiffs' counsel; rather, "extraordinary efforts", App.71, were required to win the success achieved and to do so "amazingly expeditiously". App.136 (Counsel gladly acknowledge that the efforts of the district court too were indeed extraordinary, and that the court's patience and diplomacy during the negotiating process played a vital role in the achievement of a negotiated settlement.)

The "notable concessions" referred to by the court were made by the defendants in the consent order of December 5, 1973. Of the 650.6 hours claimed by counsel 298.9 were expended on or before December 5, 1973. Of the balance, 187.3 were spent opposing intervention, and disallowed by the court and 72.7 were spent after the intervention and primarily on the application for attorneys' fees, which was contested by the defendants. Only 91.7 hours were spent on the case between the time of defendants' "notable concessions" and the entry of the consent order August 30, 1974.

During this time, as the District Court has narrated, defendants reported they were unable to fulfill their representations that a validated lieutenants examination would be immediately available, and a new procedure for the lieutenants examination was negotiated, App.72; the

defendants promoted two men in violation of the court's injunction, requiring "a series of conferences", App.72-73; plaintiffs reactivated the lawsuit when no blacks were in position to be promoted based on the results of the lieutenants examination, and undertook discovery in an effort to demonstrate the test was illegal and had a statistically significant adverse impact, App.73; and finally "[I]ntensive negotiations commenced again" App.73, which resulted in the order of August 30. There was simply no time during this period of intense, delicate negotiations, described by the District Court itself, for extensive "administrative, procedural, and clerical work".

While it is quite true, as the District Court suggests, that settlement of this lawsuit meant that less time had to be expended to prosecute it, this fact is reflected in the comparatively small amount of time spent by counsel in resolving a Title VII class action. Counsel spent 650 hours total on this case, including the application for attorneys' fees. Plaintiffs' expert testified that this is a very moderate amount of time, particularly since it includes defending an appeal.

Therefore, counsel have apparently been penalized simply for settling this case. This result is utterly out of tune with the purposes of the civil rights acts, which,as the District Court itself was aware, App.198, are often served by settlement. Patterson v. Newspaper Delivers' Union, 514 F.2d 767, 771 (1975). It is also

at odds with the purpose of the fee award provisions. Indeed the Civil Rights Attorneys Fees Award Act was enacted with the specific intention that "A 'prevailing party' should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion." H. Rep. 94-1558, supra, at 7; see S. Rep. 94-1011, supra, at 5. Plaintiffs are therefore entitled not to have their fee award reduced because of the settlement.

IV. THE DISTRICT COURT ERRED WHEN IT DENIED FEES FOR TIME SPENT SUCCESSFULLY OPPOSING INTERVENTION

The District Court refused to award any fees for the work of plaintiffs' counsel opposing intervention by white firemen after judgment, although, as the court conceded, counsel's successful efforts in the district court and this Court required "a great deal of time. . ." App. 199 The court reasoned that since the defendants also opposed intervention, they too were "prevailing parties" with respect to this phase of the case, and an award of attorneys' fees to plaintiffs, as to this phase, would therefore be "fundamentally unfair." App. 200 This holding conflicts with the rule that successful civil rights plaintiffs should ordinarily be relieved from paying their attorneys' fees, and with the purpose of that rule to encourage plaintiffs to vindicate fundamental rights and to shift the costs of discrimination away from its victims.

In a recent formulation of the standard for determining when attorneys' fees should be awarded under the civil rights acts, the Supreme Court explained its holding in Newman v. Piggie Park Enterprises, supra, as follows:

> While the Act appears to leave Title II fee awards to the District Court's discretion, 42 U.S.C. §2000a-3(b), the Court determined that the great public interest in having injunctive actions brought could be vindicated only if successful plaintiffs acting as 'private attorneys general,' were awarded attorneys' fees in all but very

unusual circumstances. Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975) (emphasis supplied)

The discretion" of the District Court to deny fees to prevailing plaintiffs under this formula is extraordinarily narrow. Nothing in this case justified permitting it to be exercised. The defendants, after all, discriminated against plaintiffs and their class on the basis of race and national origin. Their conduct made this lawsuit necessary. As violators of the law, they have no claim to a preference over their victims in the allocation of the costs of litigation.*

The circumstances of this case, moreover, can hardly be characterized as "very unusual." While attempted intervention after judgment may be uncommon, intervention is a routine occurrence in employment discrimination litigation.

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*It might be suggested, although it was not by the District Court or the defendants below, that plaintiffs should look to the intervenors themselves for fees; but this solution would be inconsistent with the fee provisions. The intervenors were not guilty of discrimination - the defendants were. Indeed the intervenors were merely asserting, albeit unsuccessfully, their own claimed rights not to be discriminated against on the basis of race. A fee award against them would only be justified if their claim were wholly groundless or made in bad faith, which no one suggests is the case. See Carrion v. Yeshiva University, 535 F.2d 722 (2d Cir. 1976) This standard is of course wholly different from the one that governs whether plaintiffs should receive a fee award.

Additionally, as a practical matter, plaintiffs should not be required to rely in a case such as this on the likelihood of recovering their attorneys' fees from one or several individual intervenors who almost certainly will not have the resources of a defendant to pay fees; plaintiffs' "relief" in many such cases would be token only.

Surely every defendant who opposes intervention does not thereby come within the narrow exception established by Piggie Park to the general obligation to pay plaintiffs' fees, whether with respect to the application to intervene or, pushing the principle to its logical extension, all proceedings instigated by the intervenors.

The District Court's reliance on Stolberg v. Members of Board of Trustees for State College of Connecticut, 474 F.2d 485, 489-491 (2d Cir. 1973) shows its misconception of the functioning of the attorneys' fees provisions of the civil rights acts. Stolberg was a §1983 action, prior to the Civil Rights Attorneys' Fees Award Act, which awarded plaintiff fees in the absence of statutory authority on the basis of the defendants' misconduct. The District Court's reference to the case suggests that the "very unusual circumstances" on which it relied were the defendants' freedom from fault with respect to the intervention. But civil rights fee provisions, after Piggie Park Enterprises, reversed the "American rule" which Stolberg applied and based fee awards not on fault but on a "fee-shifting" rationale which places the focus on whether the plaintiff has prevailed rather than on the defendant's misconduct. From this perspective, the defendants here are fundamentally in the same position as any defendant who by settlement or otherwise renounces his former discriminatory practices (or "prevails" over them) - but is still required to pay his victim's attorneys'

fees. See H.Rep. 94-1558, supra, at 7-8 (citing cases granting fees to plaintiffs after settlements, even where there is no necessity for an injunction because defendant has ceased discriminating).

Finally, for fee awards to be an incentive to counsel as they were designed to be, they must provide adequate payment. As the congress recognized while considering the Civil Rights Attorneys' Fees Award Act, fees should be paid "for all time reasonably expended on a matter." S.Rep. 94-1011, supra, at 6, quoting Davis v. County of Los Angeles, 8 E.P.D. Paragraph 9444, (C.D. Cal. 1974) at 684. Counsel contemplating civil rights representation can only be discouraged by a catalogue of exceptions to the Piggie Park rule that if they prevail they may expect a reasonable fee award. Counsel may legitimately be put on notice they they will not receive fees for work that is inefficient, uninspired, and unsuccessful; but if their work is of high quality, benefits their clients, and vindicates fundamental rights, they should be assured of compensation that will assure continued enforcement of the civil rights acts.

CONCLUSION

For all these reasons, the District Court awarded an inadequate fee, and this case should be remanded with directions to the District Court to award an adequate fee for all time reasonably expended by plaintiffs' counsel in accordance with the criteria established by this Court in City of Detroit v. Grinnell Corp., supra.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

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